IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.09.2005

CORAM:

THE HON'BLE MR.JUSTICE P.K.MISRA

W.P.NOS. 33200 AND 33731 OF 2005

P.Kannan ...Petitioner in both W.Ps.

Vs.

1. The Pondicherry University
   rep. by its Registrar,
   Kalapet, Pondicherry.

2. The Controller of Examination,
   Pondicherry University,
   Kalapet, Pondicherry.

3. The Medical Council of India,
   rep. by its Chairman,
   Opp, to Matusundari College for
   Women, New Delhi 110 002.

4. The Vinayaka Missions Medical
   College,
   rep. by its Dean,
   Keezakasakdi Post,
   Karaikal, U.T.Pondicherry. ... Respondents in W.P.NO.33200 OF 2003

1. The Controller of Examinations,
   Pondicherry University,
   Kalapet, Pondicherry.

2. The Chief Centre Superintendent,
   Vinayaka Mission medical College,
   Karaikal 609 609
   U.T.Pondicherry ...Respondents in W.P.NO.33731 OF 2003

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Prayer: W.P.No.33200 of 2003: Petition filed under Article 226 of the Constitution of India praying to issue a writ of Declaration declaring that the petitioner has passed in the subjects of Medicine, Surgery and Obsetrics and Gynaecology in the final year MBBS Examination held in November 2002 with registration No.861028 as per the MCI Regulation 1981 making eligible to undergo internship and become Registered Medical Practitioner.

W.P.No.33731 of 2003: Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari calling for the records of the 1st respondent relating to the order issued in letter reference No.PU/CE/UG/OM/MB/03/759 dated 7.10.2003 and to quash the same.

For Petitioner: Mr.N.Paul Vasantha Kumar

For respondents 1 & 2 in W.P.No.33200/03 and respondent No.1 in W.P.33731/03 : Mr.K.Srinivasan

Respondents 3 & 4 in W.P.33200/03 : Given up

Respondent No.2 in W.P.No.33731/03 : Not ready in notice.

COMMON ORDER

Heard the learned counsel appearing for the parties.

2. W.P.No.33200 of 2003 was in the list. It was stated by the counsel for both parties that connected writ petition namely W.P.No.33731 of 2003 filed by the very same petitioner was pending and both the matters may be taken up together. On consent of the counsel appearing for both parties, the records in W.P.No.33731 of 2003 were also called for and both are being disposed of by the present common order.

3. The facts giving raise to the two writ petitions are as follows:

The petitioner joined Vinayaka Mission Medical College as a student of M.B.B.S., during the academic year 1996-97. As per the regulations applicable, the scheme of study and the examination consisted of three phases. Phase III relates to Clinical subjects for a period of 18 months. Part-II of such phase III consists of

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General Medicine, General Surgery, Obstetrics and Gynaecology. As per the norms prescribed by the Medical Council of India, the petitioner had secured the minimum pass marks in respect of the subjects in Part-II. However, the respondent University had prescribed a separate marks for theory and practical which were higher than the minimum marks prescribed by the Medical Council of India. By applying such higher standard, the University declared that the petitioner had failed and petitioner was required to appear afresh in such examination. By applying the similar standard, the University had also failed several other candidates. In W.P. No.33200 of 2003, the petitioner has challenged such action of the University and sought for a declaration that he should be declared to have passed in the subjects as per the MCI Regulation and a direction to the University to permit the completion of internship.

During the pendency of such writ petition, Miscellaneous petition W.P.M.P.No.40165 of 2003 was filed, wherein, after hearing both sides, a learned Single Judge of this Court had permitted the petitioner to compelete his internship course, subject to the final orders in the writ petition. Similar permission had also been granted to other affected students who were similarly placed. When results were published declaring that the petitioner had failed, the petitioner was not aware of the actual marks and therefore, he had appeared in the subsequent examination held in May 2003. Subsequently, when the petitioner came to know the marks and found that the marks obtained by him made him eligible to be declared as having passed by taking into account the marks prescribed by the Medical Council of India, W.P.No.33200 of 2003 was filed seeking for a declaration as already indicated. Subsequently on the allegation that the petitioner was in a possession of incriminating material, during the examination held in May 2003, the Controller of Examinations had passed an order cancelling the examination of the petitioner and further directed that the petitioner would not be entitled to appear for examination for three consecutive semesters. Such action has been challenged in W.P.No.33731 of 2003.

4. A counter affidavit has been filed in W.P.No.33200 of 2003 contending that the University is authorised to prescribe higher pass marks and therefore, the action of the University not declaring the petitioner to have failed is justified. So far as other writ petition is concerned, no counter affidavit has been filed. But, it was submitted that three semesters for which the petitioner was prevented from appearing have elapsed in the meantime and therefore, the petitioner would be eligible to appear at the fresh examination and therefore that writ petition has become infructuous.

5. The learned counsel appearing for the petitioner has submitted that since the three terms for which the petitioner was

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prevented from appearing have elapsed in the meantime, it may not be necessary to deal with questions raised in W.P.No.33731 of 2003 and on the other hand, the petitioner should be declared to have passed which is the prayer in W.P.No.33200 of 2003.

6. The main contention of the petitioner is to the effect that the other students who were similarly declared to have been failed on the basis of the higher marks prescribed by the University, have been now declared to have been passed by virtue of the decision of this Court in other connected matters and such principle should be made applicable to the case of the petitioner. So far as this submission is concerned, the learned counsel for respondents has submitted that eventhough the ratio of those decisions is applicable to the case of the petitioner, in the present case, the petitioner had appeared subsequently at the examination held during the month of May 2003 and therefore it must be taken that he has acquiesced to the order passed by the University.

7. On careful consideration of the submissions made by both sides, I am unable to accept the submissions made by the counsel for the respondents to the effect that petitioner must be taken to have waived his right. It is now apparent that at the time when the petitioner appeared for the examination in May 2003, the detailed mark list had not been furnished to him by the college in question. It is of course, true that the University was not at fault. However, fact remains that the petitioner was not aware of the exact marks and therefore cannot be stated that by merely appearing at the subsequent examination, he had waived his right. Unless a person being aware of his rights consciously decides to waive his rights, the principle of waiver does not apply. The submissions made by the counsel for the University is therefore not acceptable.

8. The question raised in W.P.No.33200 of 2003 is admittedly covered by the principle laid down in the decision in The Controller of Examinations, Pondicherry University, Pondicherry Vs. K.Sudhakar reported in 2005 (3) CTC Page 2. As in the said Division Bench decision, the present petitioner has also right to continue his internship like the other similarly candidates who were successful party respondents in 2005 (3) CTC PAGE 2. Following the ratio of the said decision, the petitioner is also eligible to a similar relief in W.P.No.33200 of 2003. As a matter of fact, the learned counsel for the University had fairly submitted that the ratio of the said decision was applicable but, the petitioner must be taken as waived his right. As already indicated, the principle of waiver is not applicable to the peculiar facts and circumstances of the present case.

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10. For the aforesaid reasons, W.P.No. 33200 of 2003 is allowed and the respondents are directed to issue the mark list and degree certificate to the petitioner within a period of two weeks from the date of receipt of a copy of this order. So far as W.P.No.33731 of 2003 is concerned, it is not necessary to deal with the questions raised in such writ petition which is dismissed as infructuous. There will be no order as to costs.

Rpa

Sd/
Asst.Registrar

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Sub Asst.Registrar

To
1. The Registrar,
   Pondicherry University
   Kalapet, Pondicherry.

2. The Controller of Examination,
   Pondicherry University,
   Kalapet, Pondicherry.

3. The Chairman,
   Medical Council of India,
   Opp, to Matusundari College for
   Women, New Delhi 110 002.

4. The Dean,
   The Vinayaka Missions Medical College,
   Keezakasakdi Post,
   Karaikal, U.T.Pondicherry.

5. The Chief Centre Superintendent,
   Vinayaka Mission medical College,
   Karaikal 609 609, U.T.Pondicherry

+1 CC to Mr.K.Srinivasa, Advocate, SR No.37107

+1 CC to Mr.N.Paul Vasanthakumar, Advocate, SR No.37287

PV(CO)
BG/21.09.2005.

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